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No. 99-1687

IN THE

Supreme Court of the United States

GLORIA BARTNICKI and ANTHONY F. KANE, JR.,
Petitioners,

v.

FREDRICK W. VOPPER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, makes it unlawful for a person to disclose or otherwise use an unlawfully intercepted electronic communication, "knowing or having reason to know that the information was obtained through [unlawful] interception." 18 U.S.C. §§ 2511(1)(c), (d). Pennsylvania has enacted an essentially identical prohibition, as have a majority of the other states. *See* Petition for a Writ of Certiorari ("Petition") at 8 and n.2.

The Third Circuit held below that the First Amendment requires the invalidation of the federal and Pennsylvania statutes as applied to any defendant other than one who actually "participated in or encouraged th[e] interception" of the communication in question. App. 35a. That holding squarely conflicts with the decision of the District of Columbia Circuit in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999) ("*McDermott*"), *petition for cert. filed* (U.S. April 25, 2000) (No. 99-1709), as has been acknowledged by all parties to *McDermott*. *See* Petition for Writ of Certiorari in *McDermott v. Boehner* ("*McDermott* Petition") at 25 ("the decision [in *McDermott*] squarely conflicts with *Bartnicki*"); Brief in Opposition in *McDermott* ("*McDermott* Opposition") at 12 ("Respondent [Boehner] concedes that . . . the Third Circuit's approach in *Bartnicki* is inconsistent with the decision [in *McDermott*]"); Reply in Support of Petition in *McDermott* ("*McDermott* Reply") at 6 ("all parties here agree that '*Bartnicki* is indistinguishable from this case' . . . on the core issue").

What has generated this conflict is the difficult and important question recognized and reserved by this Court in *Florida Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989): "whether, in cases where information has been acquired *unlawfully* . . . by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well" (emphasis by the Court).

Because of the importance of the constitutional question presented, the conflict in the circuits, and the effect of the ruling below on the federal and state statutes involved, certiorari petitions have been filed in this case by the private petitioners (plaintiffs below) and by the United States. *See United States v. Vopper*, No. 99-1728 (filed April 27, 2000). Respondents' briefs in opposition attempt to wish away the compelling grounds for granting certiorari in this case, but the attempts fail.

1. Respondents assert that the Third Circuit's decision is narrowly confined to the specific facts of this case and leaves the statutes largely intact. But the court below held the statutory prohibitions of disclosure unconstitutional as applied to the entire universe of potential defendants, excepting only those who "participated in or encouraged th[e] interception." App. 35a. The identities of those directly involved in an unlawful interception "[a]ll too often . . . will go unknown," S. Rep. No. 1097, 90th Cong., 2d. Sess. 69 (1968); therefore the effect of the decision below is to render the statutes virtually unenforceable. *See McDermott*, 191 F.3d at 470 ("It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping. One would not expect them to reveal publicly the contents of the communication; if they did so they would risk incriminating themselves").

Respondents point to nothing in the Third Circuit's analysis that limits the scope of that court's holding, other than the fact that the Third Circuit characterized this case as involving a matter of "public significance." App. 31a. *See* Brief in Opposition of respondents Frederick W. Vopper, *et al.* ("Vopper Op.") at 10; Brief in Opposition of respondent Jack Yocum. Even reading that one qualification into the Third Circuit's holding, the breadth and impact of the holding cannot be gainsaid.[1]

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[1] Respondents suggest that this case might be distinguished from situations in which disclosure is prompted by a "financial incentive," as well as from cases involving "purely private communications . . . such as those . . . between spouses about their marriage, or between patients and their doctors." Vopper Op. at 12 n.7. Although the Third Circuit's holding may be limited to disclosures that involve matters of "public significance," nothing in that court's analysis suggests that the Third Circuit would view the statutes' prohibition of disclosure as constitutional whenever a case involves a "financial incentive," or whenever a disclosed communication relates to a marriage, a patient's health, or any other particular subject. On the contrary, the holding below is categorical as to all disclosures involving any subject of "public significance."

2. Respondents claim that *McDermott* is distinguishable because the defendant in that case knew (after the fact) the identities of the persons who had intercepted the communication, and the defendant may have actively sought to obtain a copy of the tape from them. *See* Vopper Op. at 17-20. That is beside the point. In this case as in *McDermott*, the defendants knew or had reason to know that the communication they were disclosing had been unlawfully intercepted.[2] In *McDermott* as in this case, the defendants played no part in the actual interception. The cases therefore are identical with respect to the only facts that are relevant under the constitutional analysis adopted by the court below. See Petition at 13-14 and n.3.[3]

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[2] The amended complaint in this action alleges that each defendant "knew or had reason to know that the private telephone conversation between Bartnicki and Kane was obtained surreptitiously through the illegal interception of their telephone conversation." Amended Complaint ¶¶ 17-18. On cross-motions for summary judgment, the district court determined that there is a dispute of material fact with respect to those allegations. App. 57a-58a, 61a-62a. Hence, at this juncture the allegations of the amended complaint must be taken as true. The Third Circuit recognized as much, stating that the question it was deciding was whether the statutes "may constitutionally be applied to penalize individuals or organizations for disclosing material *they know or have reason to know was illegally intercepted*." App. 14a (emphasis added).

[3] Respondents note that no media defendant was involved in *McDermott*. Vopper Op. at 16-17. It remains the case, however, that the Third Circuit held the statute unconstitutional as to *a non-media defendant* (respondent Yocum), while the *McDermott* court upheld the statute's application to such a defendant.

3. Finally, respondents take issue with our submission that the question presented here is the question reserved in *Florida Star*. *See* Vopper Op. at 5-8. But the very passages from the Third Circuit's decision that respondents cite in this regard make our point. The Third Circuit expressly recognized that *Florida Star* leaves open the question whether (and in what circumstances) the First Amendment permits the prohibition of disclosure of information "acquired *unlawfully* . . . by a source." App. 11a (quoting *Florida Star*, 491 U.S. at 535 n.8) (emphasis by the Court). The Third Circuit therefore rejected respondents' contention that the question presented here has been decided by this Court, App. 10a-11a, and proceeded to analyze whether the fact that the information here had been acquired unlawfully in the first instance, together with the allegation that respondents knew or had reason to know of that fact, *see supra* note 2, required a different result in this case than in the *Florida Star* line of cases.

The court resolved that question by reasoning that, although intermediate rather than strict scrutiny is warranted, *see* App. 19a-23a,[4] and although the *Florida Star* line of cases does not decide this case, *see* App. 9a-12a, this Court's decisions reveal a "tilt[] for the First Amendment in the tension between press freedom and privacy rights," App. 32a n.7, which, in the Third Circuit's estimation, requires the invalidation of statutes prohibiting disclosure even where, as in this case and *McDermott*, the information disclosed was "acquired *unlawfully* . . . by a source," *Florida Star*, 491 U.S. at 535 n.8 (emphasis by the Court).

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[4] Respondents Vopper, *et al.* take the position that the Third Circuit erred in not requiring strict scrutiny. *See* Vopper Op. at 7 n.3. Consequently, contrary to the intimations in the *McDermott* Reply at 3, 5, the question whether strict or intermediate scrutiny should be applied in this context is presented for decision in this case.

This case therefore squarely presents the important question left open in *Florida Star*, and in the decisions of this Court that preceded *Florida Star*, *see* Petition at 17, regarding the proper resolution of the tension between First Amendment concerns and privacy interests in cases where private information has been revealed only as a result of a third party's *unlawful acquisition* of that information. Furthermore, this case presents that question in the paradigmatic context in which Congress and a majority of the states have acted, through their wiretapping statutes, to protect the privacy of electronic communications: where one private party has disclosed another private party's unlawfully-intercepted communication to the media, and suit has been brought against both media and non-media defendants to redress the injury to privacy.

This case therefore is an ideal vehicle by which to decide the important constitutional question presented, to resolve the circuit conflict, and to determine the constitutionality and enforceability of the federal and state statutes involved.[5]

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[5] Subsequent to the filing of the petition in this case, a certiorari petition was filed in *McDermott v. Boehner*. As characterized by both parties to *McDermott* in their submissions to this Court, *McDermott* presents a situation far afield from Congress' central concerns in enacting Title III. Representative McDermott emphasizes that Representative Boehner's "involvement in the [intercepted] conversation was in pursuit of his duties as a Member of Congress." *McDermott* Petition at 6. Representative Boehner apparently agrees with that characterization, and argues that, as a result, the confidentiality of the conversation should be guaranteed by the Speech and Debate Clause, and by a special duty of nondisclosure applicable to Members of Congress. *See McDermott* Opposition at 2, 12-13. It is unclear in these circumstances whether Representative Boehner asserts any *personal privacy* interest in the communication in question. *See McDermott* Petition at 14; *McDermott* Reply at 1-2. Furthermore, there is no media defendant in *McDermott*.

McDermott therefore is a highly idiosyncratic case. Unlike the present case, *McDermott* does not involve the kinds of circumstances that arise in the run of cases under the wiretapping statutes, where a communication between

CONCLUSION

For the foregoing reasons and for the reasons stated in the petitions, this Court should grant the petitions for certiorari in this case and in *United States v. Vopper*, No. 99-1728.

Respectfully submitted,

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private parties has been improperly disclosed to the media by another party, and suit has been brought to redress the injury to privacy. Nevertheless, "all parties [to *McDermott*] agree that '*Bartnicki* is indistinguishable from [*McDermott*]' . . . on the core issue whether the First Amendment allows a person to be punished for disclosing truthful information on a matter of public concern [where] someone else previously obtained that information unlawfully." *McDermott* Reply at 6 (emphasis deleted).